had left their sick infant temporarily in the care of a charitable hospital, and then in the care of a nurse, who had taken a fancy to it. In proceedings in a petition for adoption brought by the nurse, the Juvenile Court refused to grant the petition for adoption, but declared the child "an abandoned child," without committing the custody of the child to any person or institution. The parents later petitioned the Juvenile Court to be appointed guardian of their own child. They were refused and appealed from the decision. The Supreme Court solemnly considered the question of the parents' right to the custody of their child. A parent always has the right of custody of his child unless the child has been committed to the care of another because the parent is unfit, unable, or unwilling to perform the parental duties.[2] As the infant, Rosa Michels, had not been committed to the care of any one else, either her parents were still her legal protectors, or she was left suspended between parents and court like Mahomet's coffin between heaven and earth. A parent may voluntarily put his child in the custody of another, but such custody is revocable at the pleasure of the parent, for he has not parted with the right of custody.[3]

Even if the court had committed Rosa to the custody of another, it is not evident that that would have changed her status. Because the custody of the parents had been interfered with for the child's welfare, it would not destroy the relationship of parent and child. The parent would still be liable to support the child.[4] Upon the parent showing himself able and competent to assume the custody of the child it would be returned to him.[5] It is only where a child is legally adopted that its status is interfered with. By adoption the rights and duties of the natural parents are shifted to the foster parents.[6] Since there was no adoption in this case, the status of the child remained the same, and the parents were not entitled to any judicial reiteration of the normal status of the child.[7] The remedy of a parent who desires custody of a child retained under order of the Juvenile Court would seem to be to apply to have the order set aside.

E. B. B.

PUBLIC SERVICE COMPANIES: VALUATION FOR RATE-MAKING PURPOSES: GOING CONCERN: PAVEMENT OVER MAINS.—Two questions with reference to valuation have, for some time past, been frequent storm centers in public utility rate hearings before com-

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[2] Ex parte Becknell (1897), 119 Cal. 496, 51 Pac. 692.
[3] Matter of Galleher (1905), 2 Cal. App. 364, 84. Pac. 352.
[4] Matter of Ross (1907), 6 Cal. App. 597, 92 Pac. 671.
[5] In re Knowack (1899), 158 N. Y. 482, 53 N. E. 676; McFall v. Simmons (1900), 12 S. D. 562, 81 N. W. 898.
[6] Viereck v. Sullivan (1914), 77 Wash. 313, 137 Pac. 456.
[7] Aldrich v. Superior Court (1898), 120 Cal. 140, 52 Pac. 148; Aldrich v. Barton (1908), 153 Cal. 488, 95 Pac. 900.

missions and courts. One is with regard to the value of the utility's plant as a "going concern." The other arises in connection with the valuation of gas or water mains lying beneath streets which have been paved after the mains have been laid. For the reason that these two problems are considered by the Supreme Court of the United States in its opinion in the case, *Des Moines Gas Company v. City of Des Moines*[1] promises to be a much cited decision in further rate controversies throughout the country.

The term "going concern" is of somewhat vague and indefinite connotation. Probably none of the various theories as to its place and scope in connection with valuation is entirely satisfactory.[2] There can be little ground for disagreement, however, with Mr. Justice Lurton's well-phrased statement that "the difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."[3] The "going value" of a utility has been recently defined by the Supreme Court of Wisconsin as "that part of its value due to its having an existing, established business."[4] Whether a separate sum to cover "going value" might properly be included in the total valuation the decision of the present case leaves somewhat in doubt. The opinion approves, however, the treatment of the problem by the master in the lower court, where a separate allowance for "going concern" was refused with the statement that the physical value had been reckoned upon the fact that the plant was in successful operation, otherwise its value would be much less. This would seem to be a valuation of "going concern" only in the sense that merely the scrap or salvage values of the various elements of the plant were not taken. Of such a valuation the New York Court of Appeals has said: "To say that that sufficiently allows for 'going value' is the same as to say that 'going value' is not to be taken into account."[5] Nevertheless the theory that "going value" is not an item to be separately considered has met with considerable approval.[6] Because of the difficulty of fixing a separate sum to

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[1] (June 14, 1915), 35 Sup. Ct. Rep. 811.

[2] See Whitten, Valuation Of Public Service Corporations, chaps. XXI to XXV, 1914 Supp. chaps. XXI to XXIV.

[3] Omaha v. Omaha Water Co. (1910), 218 U. S. 180, 30 Sup. Ct. Rep. 615, 54 L. Ed. 991 (a purchase case).

[4] Oshkosh Waterworks Co. v. Railroad Commission of Wisconsin (Wis., June 1, 1915), 152 N. W. 859, P. U. Rep. 1915-D 336 (a purchase case).

[5] People v. Willcox (1914), 210 N. Y. 479, 104 N. E. 911; see also Public Service Gas Company v. Board of Public Utility Com'rs. (1913), 85 N. J. Law 476, 87 Atl. 651; Pioneer Telephone and Telegraph Co. v. Westenhaver (1911), 29 Okla. 429, 118 Pac. 354; Bonbright v. Geary (1913), 210 Fed. 44.

[6] Cedar Rapids Gaslight Co. v. Cedar Rapids (1909), 144 Iowa, 426, 120 N. W. 966, affirmed in 223 U. S. 655, 32 Sup. Ct. Rep. 389,

cover it, there is frequently a failure to give this element what would seem to be its due consideration. The "real value" of the "difference between a dead plant and a live one," however, ought not to be disregarded. The process of building up a business and creating an income is almost invariably an expensive one, and it is well recognized that the average utility must pass through an initial period during which its income will constitute a very inadequate return on its investment. It should be noted that the opinion in the Des Moines case does not disclose the showing made in the record with reference to these matters, nor does it hold that a separate allowance to cover "going value" would, in all cases, be necessarily improper.

In determining the value of mains lying beneath the surface of the streets, should the cost of cutting through the pavement and relaying it be taken into account although the mains were, in fact, laid before any paving had been done? If present value, rather than original cost, be the basis on which the valuation is to be made,[7] and if the cost of reproduction, less depreciation, be the method by which the present value of physical structures is to be determined,[8] there seems to be no logical escape from a valuation which allows for the cost of cutting through and relaying all existing pavements.[9] On the other hand, there is a natural reluctance to allow a utility an increased valuation on the basis of an expense which was never incurred, and it seems altogether undesirable that the commendable industry of a city in improving its streets should automatically confer upon public service companies the constitutional right to exact additional charges on the theory of increased valuation. It was evidently the latter view-point that appealed to the Supreme Court in the Des Moines case, where, with a very brief consideration of the question, Mr. Justice Day reached a decision adverse to the contention of the company. The result accords with a number of decisions by other courts on the same point,[10] and there can reasonably be little ground for objec-

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56 L. Ed. 594; Spring Valley Waterworks v. San Francisco (1911), 192 Fed. 137; Cumberland Telephone and Telegraph Co. v. City of Louisville (1911), 187 Fed. 637; Montana, W. & S. R. Co. v. Morley (1912), 198 Fed. 991.

[7] San Diego Land & Town Co. v. Jasper (1903), 189 U. S. 439, 23 Sup. Ct. Rep. 571, 47 L. Ed. 892; Willcox v. Consolidated Gas Co. (1909), 212 U. S. 19, 29 Sup. Ct. Rep. 192, 53 L. Ed. 382; Minnesota Rate Cases (1913), 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511.

[8] Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1, 29 Sup. Ct. Rep. 148, 53 L. Ed. 371; Minnesota Rate Cases (1913), 230 U. S. 352, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511.

[9] See, Hayes, Public Utilities, Their Cost New and Depreciation, p. 33; Floy, Valuation Of Public Utilities, p. 86.

[10] Cedar Rapids Gaslight Co. v. Cedar Rapids (1909), 144 Iowa, 426, 120 N. W. 966; People v. Wilcox (1914), 210 N. Y. 479, 104 N. E. 911; Oshkosh Waterworks Co. v. Railroad Commission of Wisconsin (Wis., June 1, 1915), 152 N. W. 859, P. U. Rep. 1915-D,

tion in so far as the question involved is regarded in and of itself. But in its larger aspect does the decision mean that, after all, original cost is to be the basis of valuation,—a theory which the Supreme Court has definitely disapproved?[11] Or is it to be regarded as a holding that the cost-of-reproduction method is not permissible in certain instances where its use will produce a not to be desired result?[12] If logic is to yield to considerations of natural equity in applying the cost-of-reproduction test, at least one instance suggests itself in which an increased, rather than a lessened, valuation should be allowed the utility. This would be the case with regard to "piecemeal construction." The fact that a utility was constructed piecemeal, as almost every utility has been, undoubtedly added to its actual cost. Yet this could not logically be considered in determining its reproduction value.[13]

In the light of this recent decision and of Mr. Justice Hughes' previous statement in the Minnesota Rate Cases,[14] that valuation is not a matter of formulas, it would seem that the answer to many of the questions connected with the valuation of public utilities which have not yet been considered by the Supreme Court of the United States must remain a matter of considerable uncertainty until they have been specifically passed upon by that body.

W. W. F., Jr.

TORTS: LIBEL: QUALIFIED PRIVILEGE.—Persons who act in accordance with the posted requests of employers to report the incivility or misconduct of an employee, are usually considered as performing a meritorious though disagreeable public service. In *Adams v. Cameron,*[1] however, such a person was subjected to a suit for libel and forced to pay five thousand dollars damages. The defendant in this case was a passenger upon a train of which plaintiff was the conductor. It appeared from the evidence that defendant in his communication to the railroad company stated

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336. Contra, Consolidated Gas. Co. v. New York (1907), 157 Fed. 849, 855; People v. Willcox (1913), 141 N. Y. Supp. 677 (an opposite decision on the point in question was reached by the Court of Appeals in its opinion in the same case, cited supra).

[11] See cases cited in note 7, supra.

[12] In People v. Willcox (1914), 210 N. Y. 479, 104 N. E. 911, the New York Court of Appeals said: "The cost of reproduction, less accrued depreciation, rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience, and must be applied with reason."

[13] "The fact that appellant's plant has been constructed piecemeal does not increase its present value, although the cost of construction by such method may have been greater than if it had been constructed at one time." Pioneer Telephone and Telegraph Co. v. Westenhaver (1911), 29 Okla. 429, 118 Pac. 354, 357.

[14] (1913), 230 U. S. 352, 434, 33 Sup. Ct. Rep. 729, 57 L. Ed. 1511, 1556.

[1] (June 11, 1915), 20 Cal. App. Dec. 971.